

ORIGINAL

AKIN, GUMP, STRAUSS, HAUER & FELD, L.L.P.
ATTORNEYS AT LAW

AUSTIN
BRUSSELS
DALLAS
HOUSTON
LONDON
LOS ANGELES
MOSCOW
NEW YORK
PHILADELPHIA
SAN ANTONIO
WASHINGTON

A REGISTERED LIMITED LIABILITY PARTNERSHIP
INCLUDING PROFESSIONAL CORPORATIONS

1333 NEW HAMPSHIRE AVENUE, N.W.
SUITE 400

WASHINGTON, D.C. 20036

(202) 887-4000

FAX (202) 887-4288

www.akingump.com

RECEIVED

NOV 16 1998

WRITER'S DIRECT DIAL NUMBER (202) 887-4011

WRITER'S E-MAIL ADDRESS @akingump.com

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

November 16, 1998

VIA HAND DELIVERY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: Notice of Proposed Rulemaking
Amendment to the Television Table of Allotments
Buffalo, New York
MM Docket No. 98-175

Dear Ms. Salas:

On behalf of WKBW-TV License, Inc. ("WKBW-TV License"), licensee of Station WKBW-TV, Buffalo, New York, we have enclosed an original and four copies of comments by WKBW-TV License in response to the above-captioned Notice of Proposed Rulemaking.

Please direct any comments or questions on this matter to the undersigned.

Very truly yours,



Tom W. Davidson, Esq.

Enclosures

No. of Copies rec'd
List ABCDE

0+4

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

RECEIVED

NOV 16 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Amendment of Section 73.606(b))	
Table of Allotments, Television)	MM Docket No. 98-175
Broadcast Stations and)	RM-9364
Section 73.622(b), Table of Allotments,)	
Digital Television Broadcast Stations)	
(Buffalo, New York))	

To: Chief, Allocations Branch

COMMENTS

WKBW-TV License, Inc. ("WKBW-TV"), a wholly owned subsidiary of Granite Broadcasting Corporation and the licensee of Station WKBW-TV, Buffalo, New York, by its attorneys and pursuant to Section 1.415(a) of the Federal Communications Commission ("FCC" or "Commission") rules, 47 C.F.R. § 1.415(a)(1997), hereby opposes the above-captioned proposal to dereserve Station WNEQ -TV, channel *23,¹ in Buffalo, New York and reserve channel 17 for non-commercial use. The FCC's Television Table of Allotments specifically reserves some channels for use only by non-commercial educational television stations. The Commission permits commercial and non-commercial educational stations to switch their channel designations in certain limited instances where a compelling case can be made to establish that such an action will serve the public interest. For the reasons set forth below, the proposed transaction will harm the public interest and must not be granted.

¹ Channels designated with an asterisk are assigned for use by non-commercial educational broadcast stations only. See 47 C.F.R. § 73.606(a)(1997).

I. Background

On September 25, 1998, the Allocations Branch of the FCC issued a Notice of Proposed Rulemaking (“NPRM”)² requesting comment on a proposal to switch the status of the channels licensed for use by two non-commercial educational television stations in Buffalo, New York. In particular, Western New York Public Broadcasting Association (“Western”), licensee of Station WNED-TV, channel 17, and Station WNEQ-TV-TV, channel *23, Buffalo, New York, requested that the FCC amend its Television Table of Allotments to exchange the channel status of these two stations. Specifically, Western requests that channel *23 be reserved so that it can sell the channel and license to a commercial entrepreneur. Western proposes to place the proceeds from the sale of Station WNEQ-TV in a trust for the maintenance and improvement of Station WNED-TV.³ Western simultaneously requests that channel 17 be reserved for non-commercial use for Station WNED-TV in Buffalo.⁴ Western requests a similar exchange for the DTV channel assignments for Station’s WNED-TV and WNEQ-TV (i.e., Station WNED-TV would swap its nonreserved DTV channel 43 with Station WNEQ-TV’s reserved DTV channel *32).⁵

² In the Matter of Amendment of Section 73.606(b), Table of Allotments, Television Broadcast Stations and Section 73.622(b), Table of Allotments, Digital Television Broadcast Stations (Buffalo, New York), (“NPRM”), 1998 F.C.C. Lexis 5110 (released September 25, 1998).

³ See NPRM at 1.

⁴ Id.

⁵ Id.

II. If Channel 23 is Dereserved, All Interested Applicants Should Be Permitted to Apply for the New Commercial Channel

The proposed channel exchange contravenes FCC requirements mandating the auction of commercial broadcast spectrum. On August 5, 1997, Congress enacted the Balanced Budget Act of 1997, which expanded the Commission's auction authority under Section 309(j) of the Communications Act of 1934, as amended (the "Act"). Amended Section 309(j) provides that, except for licenses for certain educational or public broadcast stations, "the Commission shall grant the license or permit to a qualified applicant through a system of competitive bidding."⁶ The Commission recently adopted rules to implement its new broadcast auction authority. Thus, new commercial station licenses now must be awarded through a system of competitive bidding rather than through the use of comparative hearings or random selection.

If a license for channel 23 is issued to a commercial operator, it must be awarded in accordance with the bidding requirements of Section 309(j) of the Act. Western received a license requiring it to operate Station WNEQ-TV-TV as a non-commercial station for the benefit of the Buffalo community. If channel 23 is dereserved and no longer operated as a non-commercial station, then the license held by Western must be cancelled in accordance with Section 73.1750 of the Commission's rules governing discontinuance of operations. As required in this section, the licensee should forward the station license and other instruments of authorization to the FCC for cancellation.⁷ The channel should then be placed into the pool of available television licenses and awarded to a new licensee through the newly adopted competitive bidding procedures.

⁶ See Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Station Licenses, First Report and Order, 1998 FCC Lexis 4290, 1998 ("Broadcast Auction Order").

⁷ See 47 C.F.R. § 73.1750(1997).

In light of the clear Congressional mandate to award broadcast spectrum to the competing bidder who values it most highly, Western should not be permitted to sell a new undeserved commercial channel 23 license to a third party of its choice pursuant to a private agreement. Other interested parties must have an opportunity to express an interest in, and bid upon, this license. Notably, Sinclair Broadcasting Group (“Sinclair”) issued a press release on August 21, 1998 announcing that it “has agreed to acquire WNEQ-TV-TV, channel 23, Buffalo, NY, from Western New York Public Broadcasting Association for a price of \$33 million and anticipates it will start programming the station under a local marketing agreement.”⁸ Sinclair should not be permitted to circumvent the FCC’s bidding process by privately securing a license for a newly created commercial television channel. Any such result not only violates the FCC’s spectrum bidding requirements but unfairly and unlawfully disadvantages other parties who would be interested in acquiring this spectrum. More importantly, the federal treasury and the public, not the licensee of non-commercial Station WNEQ-TV, should be the beneficiaries of the proceeds from the sale of this new commercial broadcast spectrum license. Congress clearly intends for the federal government to receive the monies raised from the award of new commercial broadcast spectrum. Private parties such as Western should not be permitted to secure a windfall by terminating the non-commercial service it committed to provide as a licensing condition and transferring the newly available commercial channel. Thus, the winning auction price for commercial channel 23 should be paid to the federal treasury as would be the case for the award of any other new commercial television license. Any other result would violate Congress’ express intent.

⁸ See Press Release Dated August 21, 1998, “Sinclair Agrees to Buy WNEQ-TV in Buffalo for \$33 Million” attached as Exhibit A. WKBW-TV was unable to find evidence indicating that Western had officially informed the Commission of this agreement. As such, it appears that Western is less than candid with respect to its actual agreement for the sale of WNEQ-TV. The NPRM simply says that the Board of Trustees had been authorized to negotiate with a commercial buyer.

III. Grant of the Proposed Channel Exchange Would Not Serve the Public Interest

In addition, in determining whether to grant the proposed exchange, the Commission must take into account how the public will benefit from the exchange.⁹ In light of the unique service provided by public television, the Commission has found that a significant factor in this public interest determination is the extent to which a non-commercial channel exchange proposal affects a station's ability to continue to serve the viewing public. Thus, "[i]n addition to signal reach, the Commission will examine issues raised concerning the extent to [which it would] expect non-commercial licensees to maintain existing levels of service to their communities after effectuation of an exchange proposal."¹⁰ In this instance, it is evident that Western does not intend to maintain the existing level of non-commercial service upon grant of the proposed exchange. Thus, the dereservation of channel *23 and the substitute reservation of channel 17 would harm the public interest.

Specifically, the channel exchange would significantly reduce the overall amount of non-commercial programming available in the Buffalo market. In the NPRM, the Commission observes that the proposed exchange "does not propose to remove or add any channel, nor would it alter the total number of channels in Buffalo that are reserved for non-commercial educational use."¹¹ Indeed, the Buffalo community would maintain one non-commercial educational station even after Station WNEQ-TV's channel was dereserved. However, the consummation of this transaction would not maintain "existing service levels" in the community and thus this transaction is not as neutral as one might infer from the Commission's statement. To the contrary, although only one non-commercial education station is reserved for use in Buffalo, the

⁹ See 47 C.F.R. § 1.420(h)(1997).

¹⁰ In the Matter of Amendments to the Television Table of Assignments to Change Non-commercial Educational Reservations, Report and Order, 1986 FCC Lexis 3816 (1986) at 35.

¹¹ See NPRM a 2.

community actually receives programming from two educational stations – both Stations WNED-TV and WNEQ-TV. Western intends to maintain the operations at Station WNED-TV, which it believes is recognized as the “mainstay of public television broadcasting” in the Buffalo community. However, Station WNEQ-TV also provides eight hours of non-commercial programming every day and this programming is separate and distinct from that provided on Station WNED-TV.¹² Therefore, if channel 23 were converted to a commercial channel, the local Buffalo community would immediately lose approximately 56 hours of unique non-commercial programming every week.

Western’s proposed channel exchange also is deficient because Western has not established that the newly reserved Station WNED-TV will provide additional or expanded non-commercial programming to the Buffalo community to compensate for the loss of programming from Station WNEQ-TV. Relevant case law suggests that such compensating benefits are critical. For example, in one of the few instances where the Commission approved a non-commercial/commercial channel exchange, it did so based on a showing that the transaction would permit a non-commercial licensee to significantly improve its service area.¹³ This licensee proposed to use the funds received from the channel exchange to improve the facilities of its station and thereby increase the station’s coverage area from 161,181 persons to 1,396,543 persons. The increase in the station’s geographic service area was equally dramatic. Notably, Western has not proposed to expand the coverage or enhance the technical quality of Station WNED-TV’s signal. Thus, switching the channel reservations for Stations WNED-TV and WNEQ-TV will not in any way expand the geographic distribution of non-commercial

¹² In the NPRM, Western notes, without explanation, that Station WNEQ-TV “has been utilized primarily for certain programming which would not normally appeal to most of the viewing audience for Station WNED-TV.” NPRM at 2.

¹³ Amendment of Section 73.606(b), Table of Allotments, TV Broadcast Stations (Clermont and Cocoa, Florida), 5 F.C.C. Rcd 6566 (1990).

programming throughout the community or increase the number of viewers who will be able to receive the Station WNED-TV signal. Granting this switch therefore will provide no net increase in the distribution of non-commercial programming in the community. Instead, the primary result of the exchange on the local community will be a net loss of 56 hours of non-commercial programming per week.

Western seems to justify this loss by arguing that selling the weaker non-commercial station is necessary to preserve the stronger one. For example, Western argues that “the continuation of effective operations on Station WNEQ-TV has been an expensive and unproductive exercise” and that the high cost of digital conversion for both stations will be prohibitive.¹⁴ In fact, “converting two stations yielding eight channels makes neither economic nor programming sense.”¹⁵ Essentially, Western argues that this dereservation and sale of Station WNEQ-TV is necessary to preserve Station WNED-TV and maintain non-commercial programming in the Buffalo community. Recent case law does not support this claim because alleviating a station’s financial distress is not a sufficient basis to justify the dereservation of a non-commercial channel. In one recent case, for example, the licensee of two non-commercial stations requested the dereservation of one of its station’s channels.¹⁶ The licensee proposed to use the funds to further the non-commercial broadcasting aired on its remaining non-commercial channel. The Commission found that even the station’s insolvency did not constitute sufficient justification for the proposed dereservation. The Commission instead suggested that other options were available to resolve the licensee’s financial problems. The Commission added that it has maintained this view even where dereservation was sought by an incumbent non-

¹⁴ NPRM at 2.

¹⁵ Id.

¹⁶ In the Matter of Deletion of Non-commercial Reservation of Channel 16, 482-488 MHz, Pittsburgh, Pennsylvania, Memorandum Opinion and Order, 11 F.C.C. Rcd 11700 (1996).

commercial licensee which represented that it would go dark absent the grant of its dereservation request.¹⁷ Similarly, Western can develop other options to ameliorate its financial difficulties that do not require removing 56 hours per week of non-commercial programming from the airwaves.

IV. Conclusion

Based on the foregoing, WKBW-TV submits that the dereservation of channel 23 in Buffalo, New York will reduce the overall amount of non-commercial programming in Buffalo and otherwise harm the public interest. Accordingly, WKBW-TV License urges the Commission to deny Western's proposal.

Respectfully submitted

WKBW-TV LICENSE, INC

By: Tom W. Davidson, Esq.
Tom W. Davidson, Esq.
Paige S. Anderson, Esq.

AKIN, GUMP, STRAUSS, HAUER & FELD, LLP
1333 New Hampshire Ave., N.W.
Suite 400
Washington, D.C. 20036
(202)887-4000

Date: November 16, 1998

¹⁷ Id. at 11708.

EXHIBIT A

PRN 08/21 SINCLAIR AGREES TO BUY WNEQ-TV IN BUFFALO FOR \$33 MILLION

BALTIMORE, Aug. 21 /PRNewswire/ -- Sinclair Broadcast Group, Inc. (Nasdaq: SBGI) today announced that it has agreed to acquire WNEQ-TV Channel 23, Buffalo, NY, from Western New York Public Broadcasting Association ("WNYPBA") for a price of \$33 million and anticipates it will start programming the station under a local marketing agreement ("LMA"). Sinclair currently owns WUTV-TV (Fox) in Buffalo. Sinclair anticipates assigning its rights to acquire the license assets of WNEQ-TV to a third party prior to closing.

David Smith, CEO, said, "We are very excited about the prospects of programming WNEQ-TV in the Buffalo television market. We look forward to enhancing viewers' programming choices in Buffalo and to building a first-class television station that advertisers can use to reach their customers."

Both the acquisition and the commencement of an LMA are subject to FCC and Justice Department approvals. In addition to the normal FCC approvals, the WNYPBA must obtain the approval of the FCC to de-reserve Channel 23 as a non-commercial station and re-assign it as a commercial station. The LMA can begin as soon as the de-reservation is approved and the transaction has received Justice Department approval. Sinclair expects the necessary approvals for the LMA to begin will be received by the end of the fourth quarter of 1998. The transaction is expected to be financed with bank borrowings.

Sinclair Broadcast Group, Inc. is a diversified broadcasting company that currently owns or programs 56 television stations and 54 radio stations. Upon completion of all pending transactions, Sinclair will own or program 58 television stations in 37 separate markets and 50 radio stations in 10 separate markets. Sinclair's television group will reach approximately 22.9% of U.S. television households and includes ABC, CBS, FOX, NBC, WB and UPN affiliates. Sinclair's radio group is one of the top 10 groups in the United States.

SOURCE Sinclair Broadcast Group, Inc.

-0-

08/21/98

/CONTACT: David B. Amy, Chief Financial Officer, or Patrick Talamantes, Director of Corporate Finance, of Sinclair Broadcast Group, 410-467-5005/

/Company News On-Call: <http://www.prnewswire.com> or fax, 800-758-5804, ext. 110203/

/Web site: <http://www.sbgil.net/>
(SBGI)

CO: Sinclair Broadcast Group, Inc.

ST: Maryland, New York

IN: ENT

SU: TNM

-0- Aug/21/1998 16:07

EOS (PRN) Aug/21/98 16:06 86

CERTIFICATE OF SERVICE

I, Annamarie Valenti, an employee of Akin, Gump, Strauss, Hauer & Feld, L.L.P., certify that a copy of the foregoing **Comments of Granite Broadcasting Corporation** was served by hand delivery or U.S. mail, postage-prepaid* on this 16th of November, 1998, upon the following:

Chairman William E. Kennard
Federal Communications Commission
1919 M Street, N.W., Room 814
Washington, D.C. 20554

Commissioner Susan P. Ness
Federal Communications Commission
1919 M Street, N.W., Room 832
Washington, D.C. 20554

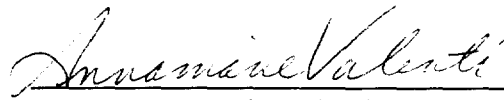
Commissioner Harold W. Furchtgott-Roth
Federal Communications Commission
1919 M Street, N.W., Room 802
Washington, D.C. 20554

Commissioner Michael K. Powell
Federal Communications Commission
1919 M Street, N.W., Room 844
Washington, D.C. 20554

Commissioner Gloria Tristani
Federal Communications Commission
1919 M Street, N.W., Room 826
Washington, D.C. 20554

Robert A. Woods, Esquire *
Schwartz, Woods and Miller
1350 Connecticut Avenue, N.W.
Suite 300
Washington, D.C. 20036-1717

John A. Karousos, Esq.
Federal Communications Commission
2000 M Street, N.W., Room 554
Washington, D.C. 20554


Annamarie Valenti